

BEFORE THE BOARD OF EQUALIZATION
OF THE STATE OF CALIFORNIA

In the Matter of the Petition for Release of
Seized Property Under the
Cigarette and Tobacco Products Tax Law

MAX WAYNE HOLMES

Appearances:

For Petitioner:	Max Wayne Holmes
For Property and Special Taxes Department:	Blanca Breeze, Senior Tax Counsel
For Appeals Division:	Steve Ryan, Senior Tax Counsel

MEMORANDUM OPINION

This opinion considers the merits of a petition for release of seized property under the Cigarette and Tobacco Products Tax Law. Petitioner, a sole proprietor, operates a retail shop under the business name Discount Cigarettes and Gifts from which he sells cigarettes. An investigation disclosed that cigarettes without stamps as well as cigarettes with counterfeit stamps were located at petitioner's retail place of business. Some of the unstamped and counterfeit stamped cigarettes were on petitioner's store shelves for retail sale, and the remainder of the unstamped and counterfeit stamped cigarettes were in a back room. The Board's Investigation Division seized the unstamped and counterfeit stamped cigarettes pursuant to subdivision (b) of Revenue and Taxation Code section 30436, and petitioner filed a petition for their release pursuant to Revenue and Taxation Code section 30438.

OPINION

Revenue and Taxation Code section 30436 provides, as relevant here:

“The following property, upon seizure by the board, is hereby forfeited to the State of California:

“

“(b) Cigarettes not contained in packages to which are affixed California cigarette tax stamp or meter impressions ..., which are offered for sale, possessed, kept, stored or owned by any person with the intent of the person to sell the cigarettes ... without payment of the taxes imposed by this part.

“....”

Petitioner does not dispute that he had unstamped and counterfeit stamped cigarettes at his retail place of business. He claims that he was unaware of the counterfeit stamps. While petitioner admits he was aware that he possessed unstamped cigarettes at his retail place of business, he asserts that the unstamped cigarettes were being held there pending arrangements for transit to a distributor for stamping. As explained below, petitioner’s alleged lack of knowledge is irrelevant to the determination of whether the seizure was proper. When cigarettes described by subdivision (b) of Revenue and Taxation Code section 30436 are seized, they must be forfeited to the State of California.

The Cigarette and Tobacco Products Tax Law imposes tax upon the distribution of cigarettes. (Rev. & Tax. Code, §§ 30101, 30123, 30131.2.) “Distribution” is defined to include the placing in this state of cigarettes in retail stock for the purpose of selling the cigarettes to consumers. (Rev. & Tax. Code, § 30008, subd. (c).) Thus, once cigarettes have been placed in retail stock, they have been distributed and tax must have already been paid by adding an appropriate stamp or meter impression on each package of cigarettes. (Rev. & Tax. Code, § 30163, subd. (a).)

The reference in subdivision (b) of Revenue and Taxation Code section 30436 to cigarettes “which are offered for sale, possessed, kept, stored or owned by any person with the intent of the person to sell the cigarettes” is essentially synonymous with the definition of distribution. In other words, once cigarettes are placed into retail stock, they are distributed, and they are held with the intent to sell. At that point, if the appropriate stamp or meter impression is not affixed to their packages, they are subject to seizure by, and forfeiture to, the State.

Retailers of cigarettes have a duty under the Cigarettes and Tobacco Products Tax Law to ensure that the distributed cigarettes they hold for sale have been properly stamped. Lack of knowledge is not a defense to seizure, and forfeiture, of distributed cigarettes that are not properly stamped: distributed cigarettes without valid stamps are subject to seizure and forfeiture on a strict liability basis. Accordingly, a retailer should purchase its cigarettes only from a licensed distributor who issues the retailer a purchase receipt containing the information required by law. (See Cal. Code of Regs., tit., 18, § 4092 (a cigarette distributor must give its purchaser a receipt showing the amount of tax collected, the name, address, and license number of the distributor, and other information).)

In the present case, petitioner held cigarettes with counterfeit stamps for sale at his retail place of business. Since the stamps were counterfeit, the cigarettes were being held for sale without payment of the tax imposed under the Cigarettes and Tobacco Products Tax Law. Thus, the seizure was proper and the cigarettes must be forfeited to the State of California.

Petitioner held unstamped cigarettes at his retail place of business, and some of them were actually on the store shelves for sale. The evidence does not support a contention that the unstamped cigarettes were on the store shelves by accident, and that the unstamped cigarettes in the back room were not being held for sale in their current unstamped condition. Rather, it appears that all of the unstamped cigarettes were available for retail sale. This conclusion is confirmed by the fact that some of the distributed cigarettes with counterfeit stamps were located in the same room as the unstamped cigarettes. Furthermore, even if an employee “accidentally” placed unstamped cigarettes on the store shelves, petitioner made that distribution possible by placing the cigarettes at his retail place of business, and petitioner is strictly liable for the distribution that occurred as a result. We conclude that all unstamped cigarettes at petitioner’s retail place of business were part of petitioner’s retail stock and had been distributed, that their seizure was proper, and that they thus must be forfeited to the State of California.

The petition for release of the seized cigarettes is denied.

Adopted at Sacramento, California, on November 13, 2002.

John Chiang_____, Chair

Claude Parrish_____, Member

Johan Klehs_____, Member

Dean Andal_____, Member

Marcy Jo Mandel_____, Member*

*For Kathleen Connell, pursuant to Government Code section 7.9.